# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ARIEL R. MARINO, JR.,<br><br>Appellant. | No. 37288-6-II<br><br>UNPUBLISHED OPINION |

Armstrong, J. — Ariel Marino appeals his Pierce County conviction of unlawful possession of a firearm.[1] He contends that his right to trial by jury was violated when Tacoma Police Officer James Pincham offered opinions about his guilt and the credibility of a witness. We affirm, finding that the challenged statements did not constitute manifest constitutional error, and this issue cannot be raised for the first time on appeal.

FACTS

Marino came to the attention of authorities during a field visit by community corrections officers to Sharon Leonard's residence. They were checking on probationer Leonard because she had failed to report for two weeks. Marino and Mike Narone were in a back bedroom on the left side of the house when the corrections officers arrived. Marino came out to the living room almost immediately, and Narone came out sometime later. While checking the bedroom for the presence of other persons, one of the officers discovered a loaded handgun in a dresser drawer. He also found mail addressed to Marino, a car registration in Marino's name, and a dictionary belonging to Marino in that room. Marino had initially told the corrections officers that the left

[1] A commissioner of this court initially considered this matter pursuant to RAP 18.14, and referred it to a panel of judges.

bedroom was his. After the gun was found, he asserted that he slept at the house only occasionally, and when he did, he slept upstairs. What he meant by his earlier statement, he explained, was that he had formerly used the bedroom.[2]

The corrections officers notified the Tacoma Police, and Officer Pincham responded. When he asked about the gun, everyone denied ownership. However, when Pincham questioned Leonard outside the presence of the others, she told him that she had seen Marino holding it two days earlier.[3] Pincham testified that after talking with Leonard, he arrested Marino "for being in possession of the firearm." 4 Report of Proceedings (RP) at 329.

Officer Pincham did not take the mail, the dictionary, or the car registration into evidence. At trial, defense counsel questioned him extensively about that failure. On redirect, the deputy prosecutor asked if Pincham thought those items were critical to the investigation. There followed this colloquy:

> A No. I didn't think that they were critical enough to pick up because of the fact that I saw them there and the DOC officers saw them there. They showed me -- they helped me decide whose room it was. I figured -- I thought that there was more -- stronger evidence to place the weapon into Mr. Marino's hands than just that paperwork.
> Q What was that?
> A Statements that were made.

4 RP at 359-60.

Marino did not object to this testimony at trial, but he now contends that it was improper opinion testimony on guilt, and that it also constituted an opinion that Leonard was telling the truth when she said she saw him with the gun.

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[2] The house belonged to Marino's mother, and he had grown up in it.

[3] At trial, Leonard denied making this statement to Pincham.

ANALYSIS

Generally, appellate courts will not consider issues raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). However, we will review a manifest error that affects a constitutional right. RAP 2.5(a)(3). An error is not "manifest" unless the defendant can show actual prejudice, i.e., practical and identifiable consequences in the trial. *State v. Kirkman*, 159 Wn.2d 918, 934-35, 155 P.3d 125 (2007); *McFarland*, 127 Wn.2d at 333.

Impermissible opinion testimony about guilt or credibility may violate the defendant's constitutional right to a jury trial if it affects the jury's independent determination of those matters. *State v. Kirkman*, 159 Wn.2d at 927-28. But it cannot be a "manifest" error unless it is an explicit, or nearly explicit, statement on an ultimate issue of fact. *Kirkman*, 159 Wn.2d at 936.

Marino reads too much into the statements at issue here. Officer Pincham did not say he believed Leonard;[4] he simply said that her statement provided the basis for the arrest, and that he thought it was stronger evidence than items that showed Marino was using the bedroom. Because the statements did not directly (or even indirectly) express a personal opinion about either Leonard's credibility or Marino's guilt, there was no manifest error. Having failed to object below, Marino has waived the right to challenge the testimony on appeal.

Nevertheless, we note that there was no error. It was entirely proper for Officer Pincham to explain the actions he took. *See Kirkman*, 159 Wn.2d at 930-31 (officer could testify about the interview protocol he used for the minor victim, including the statement that he used it because he

[4] In any case, a statement that Pincham believed Leonard was telling the truth at the house could hardly be considered vouching for her credibility, inasmuch as she denied the statement at trial.

wanted to determine whether she could distinguish between the truth and a lie); *State v. King*, 135 Wn.2d 662, 672-73, 145 P.3d 1224 (2006) (corrections officer could testify that he wrote a report because he thought defendant's comments to a former witness involved a threat); *State v. Lewellyn*, 78 Wn. App. 788, 791, 795-96, 895 P.2d 418 (1995) (officer could testify that he arrested defendant because he believed defendant was under the influence of alcohol, based on his appearance and performance on field sobriety tests), *aff'd*, 130 Wn.2d 215 (1996).

The judgment is affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.